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No. 96-1718

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HOMEBUILDERS ASSOCIATION OF CENTRAL ARIZONA, a Non-Profit Arizona Corporation; and MARLBOROUGH DEVELOPMENT CORPORATION, an Arizona Corporation,

Petitioners,

v.

CITY OF SCOTTSDALE, a Municipal Corporation, HERBERT R. DRINKWATER, RENE WENDELL, JAMES D. BRUNER, KATHRYN CAMPANA, MYRON R. DEIBEL, WILLIAM SODERQUIST, and BILL WALTON, Members of the City Council of the City of Scottsdale,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Arizona Supreme Court properly concluded that petitioners' failure to contest the reasonableness of the amount of Scottsdale's Water Resources Development Fee eliminated in this case any question under the Fifth Amendment as to whether that Fee was "roughly proportional" to the burden on the community caused by proposed development.

2. Whether the separation of powers doctrine embodied in the Constitution's creation of three coordinate branches of the federal government has any applicability to the states.

RULE 29.6 DISCLOSURE

Pursuant to Rule 29.6 of the Rules of this Court, Respondents disclose that Respondent City of Scottsdale is a municipal corporation without parent or subsidiary companies.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondent City of Scottsdale, Arizona and the members of its City Council (collectively, "Scottsdale") hereby oppose the Petition for a Writ of Certiorari to review the judgment of the Arizona Supreme Court filed in this case.

OPINIONS BELOW

Scottsdale concurs with the Opinions Below statement set forth in the Petition.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Petition's Statement of Constitutional Provisions And Statutes Involved is incomplete in that it omits reference to the following authorities:

The lengthy text of Arizona Revised Statute § 9-463.01 (I) is set forth in the Appendix hereto. (Resp. App. 1a)

Arizona Revised Statute § 9-463.05(B)(2) provides:

> Monies received from development fees assessed pursuant to this section shall be placed in a separate fund and accounted for separately and may only be used for the purposes authorized by this section. Interest earned on monies in the separate fund shall be credited to the fund.

Arizona Revised Statute § 45-561(12) states:

> "Safe-yield" means a groundwater management goal which attempts to achieve and thereafter maintain a long-term balance between the annual amount of groundwater withdrawn in an active management area and the annual amount of natural and artificial recharge in the active management area.

The lengthy text of Arizona Revised Statute § 45-576 is set forth in the Appendix hereto. (Resp. App. 1a-4a)

STATEMENT OF THE CASE

Petitioners' Statement fails to note that at the time this action arose, Scottsdale was under a mandate by the State of Arizona to acquire new water resources by the year 2001, or risk having the State place a moratorium on all future development within Scottsdale's boundaries. (Pet. App. 4-5 & 48) The Groundwater Management Act of 1980, Arizona Revised Statutes ("A.R.S.") §§ 45-401 to

-704 (1987 & Supp. 1997) ("GMA"), requires Scottsdale to reduce its dependence on groundwater by achieving "safe-yield" (Pet. App. 4 and A.R.S. § 45-561(12)), which is a balance between the amount of underground water pumped out of Scottsdale's aquifers and the amount naturally and artificially recharged. *Id.* To achieve safe-yield, the GMA requires Scottsdale to have an "[a]ssured water supply" before approving any new development within its boundaries. (Pet. App. 4-5 & 48 and A.R.S. § 45-576(B)) "Assured water supply" means that sufficient groundwater or surface water and appropriate delivery facilities will be continuously available to satisfy the water needs of all development for 100 years. (Pet. App. 4-5 & 48 and A.R.S. § 45-576(I)) At the time this action arose, Scottsdale was deemed to have an assured water supply until December 31, 2000. (Pet. App. 4-5 & 48 and A.R.S. §§ 45-576(E), (I))[1] Thereafter, the Arizona Director of Water Resources could find that Scottsdale does not have an assured water supply, thereby precluding all new development within Scottsdale's boundaries. (Pet. App. 4-5, 10-11 & 48 and A.R.S. § 45-576(C), (E) & (I))

Following passage of the GMA, Scottsdale conducted a comprehensive study and found that it lacked sufficient water to service development after December 31, 2000. (Pet. App. 5, 8, 10-11, 48-49, 65 & 86) Scottsdale then instituted its Water Resource Development Fee (the "Fee") for the specific purpose of acquiring the water needed to allow future development within Scottsdale's boundaries. *Id.*

It is not true, as stated on page 5 of the Petition, that the costs associated with the purchase of Planet Ranch were used as "*the* basis for the assessment of the fee." (Emphasis added). The italicized language implies that the costs associated with Planet Ranch were the only bases

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[1] The deadline has now been moved up to January 1, 1998. *See* A.R.S. § 45-576(E).

for establishing the amount of the Fee. The costs associated with Planet Ranch were just a few of the many cost factors used to establish the amount of the Fee, some of the others being the estimated cost of constructing Water Factory 21, and the purchase or lease of water rights from various Native American tribes. (Pet. App. 5, 19, 48-49, 67 & 73)

The Petition also incorrectly states, at page 5, that the evidence at trial established that Scottsdale "would not" receive any water from Planet Ranch or any of the other proposals presented at trial for acquiring new water. In fact, the evidence presented was merely that one or more of the various proposals for acquiring new water might not be used if better alternatives subsequently arose. (Pet. App. 8-9, 11-12, 66-67 & 73)

While the Petition accurately notes, on page 5, that the trial court found "that no reasonable relationship existed between the amount of the fee and the burden" justifying its imposition, the trial court's conclusion regarding the lack of any "reasonable relationship" was unsupported by any evidence, and rested entirely upon the court's erroneous legal conclusion that fees collected to fund projects not immediately delivering water are per se unreasonable. (Pet. App. 18-21, 23) As the Arizona Supreme Court clearly held, the reasonableness of the Fee was actually never an issue before the trial court, and petitioners have repeatedly admitted as much throughout these proceedings. *Id.*

Petitioners also erroneously claim (Pet. 7) that the Arizona Supreme Court failed to identify any support for its conclusion that the Fee would be used to acquire new water supplies. In truth, the Arizona court noted that petitioners could be assured the Fee would be used to acquire new water supplies, because A.R.S. § 9-463.05(B)(2) requires development fees to be segregated and used only for the purpose for which they are imposed. (Pet. App. 17)

Finally, the Petition incorrectly states, on page 8, that the Arizona Supreme Court did not explain how "the unproven new water resources equal a beneficial use to payor's property." To the contrary, the Arizona court fully explained how imposition of the Fee would benefit petitioners:

> Developers who pay the fees and thus contribute to the capital needed for water surely will receive a benefit from the city's ability to approve new developments. Without the assurance of a water supply, developers would be unable to develop and market their land.

(Pet. App. 10-11)

REASONS FOR NOT GRANTING THE PETITION

Petitioners, a group of real estate developers, go to great lengths to manufacture federal questions where none is presented by the actual holding of the Arizona Supreme Court. In urging this Court to decide whether the "rough proportionality" standard announced by this Court in *Dolan* v. *City of Tigard*, 512 U.S. 374, 375 (1994), should apply in this case, petitioners simply ignore the alternative holding below that they never challenged whether Scottsdale's Fee was roughly proportional to the burdens justifying its imposition. Thus, the question of the applicability of the *Dolan* standard is of purely academic interest. Plainly, the Court should wait until a case comes along where the applicability of *Dolan*'s "rough proportionality" standard actually would affect the proper outcome of the case.

Petitioners' other question involving "separation of powers" obviously does not involve a question of federal law. There is nothing in the Constitution that dictates the proper relationship among the coordinate branches of government as they operate within any particular state. Indeed, the Tenth Amendment arguably protects the states from any federal judicial interference into the division of authority within state government. In any event, the question certainly does not warrant review by this Court.

I. REVIEW OF THIS CASE WOULD RESULT IN AN ADVISORY OPINION.

The Arizona Supreme Court's opinion is devoted almost exclusively to analyzing questions of state law in connection with the validity of Scottsdale's Water Resources Development Fee. This is scarcely surprising because petitioners never raised any federal questions in the proceedings below. Instead, the Arizona Supreme Court, *sua sponte*, raised the issue of the relevance of *Dolan* in this case. It also concluded, however, that the "rough proportionality" issue was not presented because petitioners never challenged the overall reasonableness of the Fee. As the court below plainly held: "In light of our holding that the reasonableness of the amount of the Scottsdale fee was not raised in the trial court, whether that fee is roughly proportional to the burden imposed on the community was likewise not in question." (Pet. App. 21)

Not only is this holding, which is completely case-specific, inherently unworthy of certiorari, but incredibly, petitioners do not even address the fact that they conceded the reasonableness of the Fee. Instead, they leapfrog this concession and challenge the Court's alternative discussion concerning whether the *Dolan* standard applies in a case such as this one, which involves a facial challenge to a generally applicable, legislatively imposed fee program as opposed to an individually-targeted, adjudicatively imposed dedication of private property.

Moreover, the Arizona court's discussion of *Dolan* is hardly definitive. While it did conclude that *Dolan* does not apply in the instant case, it did not hold that the "rough proportionality" standard might not apply in other development fee cases. Instead, the Arizona court merely observed that "there may be good reason to distinguish the *Dolan* adjudicative decision from the Scottsdale legislative one." (Pet. App. 22) Whatever the merit of the Arizona court's passing observation, it plainly provides no basis for this Court to review the decision below.

II. THIS COURT LACKS JURISDICTION TO DETERMINE WHETHER THE ARIZONA COURT VIOLATED FEDERAL SEPARATION OF POWERS PRINCIPLES.

Petitioners' remaining issue is frivolous. They complain that the Arizona Supreme Court's interpretation of the relevant state laws so departs from the intent of the legislature that the holding "amounts to nothing more than judicial policy making . . . ." (Pet. 15) Petitioners then assert that this "violates the constitutional separation of powers doctrine." Not surprisingly, petitioners cite no case in support of this proposition. This is because it is well established that separation of powers is a doctrine embodied in the Constitution only to regulate the coordinate branches of the federal government.

This Court long ago rejected any suggestion that the federal doctrine of separation of powers has any applicability to the States.[2] See, *e.g.*, *Whalen* v. *United States*, 445 U.S. 684, 689 n.4 (1980); *Elrod* v. *Burns*, 427 U.S. 347, 352 (1976); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255 (1957). As the Court said in *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902):

> Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking,

[2] It is unclear whether petitioners are also claiming that the Arizona court's construction of Arizona statutes violates separation of powers principles established by Arizona law. This Court lacks authority to determine whether the Arizona Supreme Court has violated these provisions, since that issue is purely one of state law. *See, e.g., Highland Farms Dairy* v. *Agnew*, 300 U.S. 608, 612 (1937) (so far as the objection to the exercise of power is founded on state law, it is answered by a decision of the highest court of the state); *Dreyer* v. *Illinois*, 187 U.S. 71, 83-84 (1902) (this Court lacks authority to determine whether a local statute violates separation of powers provision in state constitution).

> pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry. . . .

In sum, there is no basis to challenge in this Court the state supreme court's decision on separation of powers grounds. Indeed, the decision below contains no independent holding on any question of federal law that would justify certiorari. Accordingly, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

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Arizona Revised Statute § 9-463.01(I) states:

> If the subdivision is comprised of subdivided lands, as defined in § 32-2101, and is within a groundwater active management area, as defined in § 45-402, the preliminary plat shall not be approved unless it is accompanied by a certificate of assured water supply issued by the director of water resources, or unless the subdivider has obtained a written commitment of water service for the subdivision from a city, town or private water company designated as having an assured water supply by the director of water resources pursuant to § 45-576 or is exempt from the requirement pursuant to § 45-576. The legislative body of the municipality shall note on the face of the preliminary plat that a certificate of assured water supply has been submitted with the plat or that the subdivider has obtained a written commitment of water service for the proposed subdivision from a city, town or private water company designated as having an assured water supply, pursuant to § 45-576 or is exempt from the requirement pursuant to § 45-576.

Arizona Revised Statute § 45-576 states:

> A. A person who proposes to offer subdivided lands, as defined in § 32-2101, for sale or lease in an active management area shall apply for and obtain a certificate of assured water supply from the director prior to presenting the plat for approval to the city, town or county in which the land is located, where such is required, and prior to filing with the state real estate commissioner a notice of intention to offer such lands for sale or lease, pursuant to § 32-2181, unless the subdivider has obtained a written commitment of water service for the subdivision

from a city, town or private water company designated as having an assured water supply pursuant to this section.

B. A city, town or county may approve a subdivision plat only if the subdivider has obtained a certificate of assured water supply from the director or the subdivider has obtained a written commitment of water service for the subdivision from a city, town or private water company designated as having an assured water supply pursuant to this section. The city, town or county shall note on the face of the approved plat that a certificate of assured water supply has been submitted with the plat or that the subdivider has obtained a written commitment of water service for the proposed subdivision from a city, town or private water company designated as having an assured water supply pursuant to this section.

C. The state real estate commissioner may issue a public report authorizing the sale or lease of subdivided lands only if the subdivider, owner or agent has obtained a certificate of assured water supply from the director or the subdivider has obtained a written commitment of water service for the lands from a city, town or private water company designated as having an assured water supply pursuant to this section.

D. The director shall designate private water companies in active management areas that have an assured water supply. If a city or town acquires a private water company which has contracted for central Arizona project water, the city or town shall assume the private water company's contract for central Arizona project water.

E. The director shall designate cities and towns in active management areas where an assured water

supply exists. If a city or town has entered into a contract for central Arizona project water, the city or town is deemed to continue to have an assured water supply until December 31, 1997. Commencing on January 1, 1998, the determination that the city or town has an assured water supply is subject to review by the director and the director may determine that a city or town does not have an assured water supply.

F. The director shall notify the mayors of all cities and towns in active management areas and the chairmen of the boards of supervisors of counties in which active management areas are located of the cities, towns and private water companies designated as having as assured water supply and any modification of that designation within thirty days of the designation or modification. Persons proposing to offer subdivided lands served by those designated cities, towns and private water companies for sale or lease are exempt from applying for and obtaining a certificate of assured water supply.

G. This section does not apply in the case of the sale of lands for developments which are subject to a mineral extraction and processing permit or an industrial use permit pursuant to §§ 45-514 and 45-515.

H. The director shall adopt rules to carry out the purposes of this section no later than January 1, 1995.

I. For purposes of this section, "assured water supply" means all of the following:

1. Sufficient groundwater, surface water or effluent of adequate quality will be continuously available to satisfy the water needs of the proposed use for at least one hundred years. Beginning January 1 of the calendar year following the year in which a

groundwater replenishment district is required to submit its preliminary plan pursuant to § 45-576.02, subsection A, paragraph 1, with respect to an applicant that is a member of the district, "sufficient groundwater" for purposes of this paragraph means that the proposed groundwater withdrawals that the applicant will cause over a period of one hundred years will be of adequate quality and will not exceed, in combination with other withdrawals from land in the replenishment district, a depth to water of one thousand feet or the depth of the bottom of the aquifer, whichever is less. In determining depth to water for the purposes of this paragraph, the director shall consider the combination of:

(a) the existing rate of decline.

(b) The proposed withdrawals.

(c) The expected water requirements of all recorded lots that are not yet served water and that are located in the service area of a municipal provider.

2. The projected groundwater use is consistent with the management plan and achievement of the management goal for the active management area.

3. The financial capability has been demonstrated to construct the water facilities necessary to make the supply of water available for the proposed use, including a delivery system and any storage facilities or treatment works. The director may accept evidence of the construction assurances required by § 9-463.01, 11-806.01 or 32-2181 to satisfy this requirement.